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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 373

ISADORE ABERLIN,

Petitioner,

against

JAMES ZISMAN and LENORE ZISMAN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Petitioner, respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the First Circuit, dated May 21, 1957.

Petitioner appealed from a judgment in the United States District Court, District of Massachusetts in favor of the defendants after verdict by the jury and from an order of the court denying plaintiff's motion for a new trial. The United States Court of Appeals for the First Circuit dismissed the appeal from the judgment on technical grounds but held the appeal from the order brought up for review all errors in the judgment and then affirmed the order denying plaintiff's motion for a new trial. The appeals were taken on the ground that the verdict was contrary to and against the weight of evidence and contrary to law, and that the erroneous verdict was brought about by the serious errors of the trial court in

its charge to the jury on the law and by the prejudicial and erroneous errors in rulings during the trial, and the conduct of the trial in general.

The consolidated record-appendix in this case as printed for the Court below, together with such additions as are necessary to show the opinions and proceedings in the United States Court of Appeals are filed herewith in accordance with the rules of this Court.

Opinions Below

The decision of the Court of Appeals was filed May 21, 1957, and thereafter amended on May 27, 1957. It is reported at 244 Fed. Rep. 2nd 620.

The original opinion and the copy of the letter amending same are printed on pages 26-30 of the appendix herein.

Jurisdiction

The decision of the Court of Appeals was filed May 21, 1957 and amended May 27, 1957.

The jurisdiction of this Court is invoked under 28 USCA., section 1254, subd. 1.

The jurisdiction of the District Court of Massachusetts was invoked for diversity of citizenship, the plaintiff being a resident of and domiciled in New York and the defendants in Massachusetts.

Questions Presented

The questions herein presented were raised on the trial of this action by requests to charge and by objections to the trial court's refusal to charge as requested and to rulings during the trial and to the charge to the jury.

1. Does a State which has granted a decree of divorce and awarded custody of children, retain such control over the children as wards of the Court as to have authority to modify such decree with respect to custody, without service or notice upon either or both natural parents, and even when the child or children are no longer within the state?

2. Whether after a decree of divorce awarding custody to one parent as against the other and in the absence of a finding of unfitness of the parent to whom custody was not awarded, the parents could consent to remove the child from the jurisdiction of the state conferring custody, and voluntarily transfer custody from one to the other as the needs of the child required without first obtaining permission and consent for such transfer and modification of the custody decree from the court originally making same.

3. Whether a custody order issued in violation of due process without notice or service upon the natural parent is effective beyond the boundaries of the state issuing it, to confer immunity upon a private person acting under such order in violation of the criminal statutes of another state and to confer immunity upon such person from civil liability for his tortious acts.

4. Whether a state may issue orders and condone acts and make decisions which violate the criminal statutes of another state.

5. Has a divorced father to whom custody of children has not been awarded, in the absence of any finding of unfitness, lost all his common law rights to his children and been freed of all obligation to them except the duty to support, so that if the mother subsequent to the decree becomes unfit, or unable to care for them and turns the children over to him without obtaining modification of the decree, any relative or stranger may petition the

courts and obtain custody of such children without notice to the father?

6. What is the meaning of "legal custody", and what rights, privileges and duties does it entail?

7. When a father, to whom custody has not been awarded, by decree, has actual physical custody of children with the mother's consent and while she is actually a patient at a mental hospital, may any relative or stranger seize those children, without valid court order, and be immune from civil or criminal prosecution simply because the father did not obtain modification of the custody decree before assuming the care of the children?

8. Whether the trial court committed prejudicial error and deprived the father of his constitutional rights by failing and refusing to follow the statutory, usual and accepted modes of practice and procedure?

Statutes Involved

Annotated Laws of Mass., Chapter 208, Section 28 and 30.

New York Penal Law Section 1250, subdivision 2 and Section 1252.

United States Constitution Amendments IV and XIV; Section I.

Facts

This is an action by the father of a minor child for damages for the unlawful abduction of his child by the defendants and the conspiracy to abduct her.

Another facet of the litigation arising from the abduction is already before this court on a petition for certiorari, numbered 346 for the October 1957 term.

The facts, as has already been pointed out in the other petition for certiorari, are undisputed, scarcely need repetition, and were admitted by the defendants on the trial. However for the sake of clarity they will be briefly repeated.

The infant, Dorothy Gail Aberlin, then 10 years of age, on April 1, 1955 was living with her father in New York (R. 10, 11, 22, 26, 27, 28, 29, 49). Her mother and father had been divorced in Massachusetts and her custody had been awarded to the mother (R. 49). The father consented to the award of custody and voluntarily agreed to pay $25.00 per week for her support. The child lived with her mother in Boston until the summer of 1954, when she was sent to Maine to Camp for the summer and then to New York to her father (R. 57). In September of 1954 the mother established residence in New York and obtained employment in New York (R. 26). In February, 1955 the mother herself again turned the child over to the father and went into Bellevue Hospital in New York for psychiatric examination (R. 26, 27, 28, 29). Her commitment was there recommended and proceedings therefor instituted (R. 29, 43). On March 5, 1955, the defendant Zisman, an attorney in Massachusetts and her brother-in-law went to Bellevue Hospital obtained her release to him on condition that he place her in a hospital for the mentally ill in Massachusetts. On the same day he took her to Boston and she was there immediately admitted to Mattapan State Hospital at Boston as a mentally ill person (R. 42, 43). On March 10, 1955, she was formally adjudicated insane by Judge Mahoney of the Suffolk County Probate Court (R. 43, 44, 45).

Thereafter the admitted facts show that the Zismans demanded that the child be sent to live with them (R. 31, 33, 34). The father refused. On April 1, 1955, without notice or warning, the defendant Zisman admitted he went to New York, and with a "family friend" who knew where the child was going to school, waited outside the school,

took the child and transported her to Boston (fols. 10, 11, 12). Only after he had taken the child did he send any notification to the father (R. 13, 14, 33, 34). On boarding a bus to leave New York he gave the "family friend" a letter to mail to the father and instructed her to send the father a telegram (R. 12, 13, 33, 34). Thereafter the Zismans demanded money from the father for the child's support and refused to return the child (R. 14, 15, 54). It is admitted that on the day Zisman took the child, her mother was an adjudicated incompetent patient at Mattapan State Hospital.

The Zismans as a defense for their actions claimed that they took the child by virtue of an alleged order of the Probate Court of Suffolk County, Massachusetts dated March 25, 1955, awarding temporary custody to Mrs. Zisman (R. 50, 51, 52). It is admitted that this order was obtained without notice or service of any kind upon the father (R. 10, 32, 34). It is further admitted that this order was obtained by the Zismans on an allegation that the child was being "improperly cared for" although neither Zisman nor his wife had any knowledge as to the circumstances under which the child was living (R. 8, 9, 10, 22, 23). It is further admitted and the record shows that this order was subsequently vacated on September 23, 1955, as of the day it was granted. As a further defense to their actions the defendants Zismans alleged that they did not take the child forcibly or by fraud but that she went willingly.

Reasons for Granting the Writ

In the case at bar, the United States Court of Appeals in its opinion states:

> "The mother, not being well and being on the verge of a nervous breakdown, asked the father to take care of the girl and the child was physically transferred to

New York City to live in an apartment occupied jointly by the father and by his sister Gertrude Aberlin. For a short time the mother who had gone to New York, received treatment at the Bellevue Hospital. Later at the instance of her sister, Lenore A. Zisman and of her brother-in-law James Zisman, the latter two being defendants herein, the mother was brought back to Massachusetts; and for a time the mother was legally committed to the Boston State Hospital.

While this commitment was outstanding, the Probate Court for Suffolk County on March 25, 1955 entered a decree awarding temporary custody of the minor child to her aunt Lenore Zisman. It is claimed that this decree was void for lack of Notice to the father.

At any rate, armed with this decree defendant James Zisman journeyed to New York, found the little girl at school and persuaded her to accompany him back to the home of the two defendants in Stoughton, Mass., where she stayed for several months. There was no evidence that this removal was accomplished by the use of any force or fraud practiced upon the girl, who testified that she went willingly and that her life with her aunt and uncle was a happy one. On the other hand, it is clear that the father had no advance knowledge of this planned removal and did not give his consent thereto. * * *"

The Order for Temporary Custody Violated Due Process and Is Void

On the very facts as given in its own opinion, the decision of the United States Court of Appeals for the 1st circuit is in conflict with the Constitution of the United States, 4th and 14th amendments, the decisions of the Supreme Court and the laws and decisions of both New York and Massachusetts.

It seems scarcely necessary to argue that a custody decree made by Massachusetts while the child was admittedly living with her father, with her mother's consent and through her mother's affirmative acts, without notice to the father, was void, unconstitutional, in violation of due process and powerless to confer any rights or bind any court.

It is such well settled law that no court may render effective judgments without due process of law, that the citations seem superfluous. Where the process by which the Court claims jurisdiction is merely questionable, the judgment is voidable. But where there has been no service or notice of any kind, the Court never obtained jurisdiction and any judgment rendered by it without jurisdiction is absolutely void.

Baker v. *Baker Eccles & Company,* 242 U. S. 394;
McDonald v. *Mabee,* 243 U. S. 90;
Needham v. *Thayer,* 147 Mass. 536;
Eliot v. *McCormick,* 144 Mass. 10.

In the case at bar the order giving the Zisman's temporary custody was absolutely void. No pronouncement of any Court can endow it with validity.

The invalidity of the order becomes even more pronounced upon examination of the law of Massachusetts itself with respect to the modification of custody decrees. In Chapter 208 of the Annotated Laws of Massachusetts, Section 28, the law states—"Upon decree of divorce or petition of either parent, or of a next friend in behalf of the children, *after notice to both parents,* after decree (italics ours) the Court may make etc."

The order giving Mrs. Zisman temporary custody being absolutely void, cannot give any cover or protection to the Zismans for the abducting of appellant's child. Plaintiff requested the trial Court to so instruct the jury (Requests to charge Nos. 11, 12, 13, 19, 20 (R. 47, 48)).

It was reversible error for the trial Court to refuse to so instruct the jury.

The Decision Is in Conflict With Both New York and Massachusetts Law and Decisions Under Which the Taking of the Child Without the Knowledge or Consent of the Father Is a Crime as Well as a Tort

The taking of the child by Zisman was a wrongful act. The Trial Justice in the District Court in his charge excused this wrongful act and immunized the perpetrators by charging the jury that if the child went willingly without force or fraud, there was no kidnapping and the father could not recover and that in any event only the "legal" guardian could recover. The United States Court of Appeals ignored the issue of whether the consent of a 10 year old child was a defense but held with the District Court, that only the "legal" guardian of the child had any rights and the father not being the "legal" guardian no tort was committed as against him and he had no cause of action.

Both these decisions are contrary to both New York and Massachusetts Law.

Under the New York Penal Code, Section 1250, Subdivision 2, it is unlawful to take a child from anyone who has lawful care or control thereof, and that one who does so is guilty of kidnapping which is a felony.

> "A person who wilfully: 2. Leads, takes, entices away, or detains a child under the age of sixteen years, with intent to keep or conceal it from its parents, guardian, or *other person having the lawful care or control thereof,* or to extort or obtain money or reward for the return or disposition of the child, or with intent to steal any article about or on the person of the child;
>
> • • •
>
> Is guilty of kidnapping, which is a felony • • • ." (Italics ours.)

Under Section 1252, the consent of a child under 16 is no defense to the crime of kidnapping.

On the facts as stated by the United States Court of Appeals itself, the father certainly had lawful care and control of the child when she was taken from him even if he didn't have legal custody. When his child was taken from him under a void order, a crime was committed, *prima facie* at least. Ignoring Section 1252 of the New York Penal Code, the Trial Justice went to great trouble in interrogating the child, to show the jury that the child went willingly with her uncle (R. 23, 24). Then he went to great lengths in his charge to tell the jury that if there was no evidence of force or fraud there was no kidnapping (R. 38, 41). In his charge the Trial Court states: "Now kidnapping to be legally such must be accompanied by force or fraud. If you find in this case there was neither force nor fraud, then there was no kidnapping and your answer to both questions must be No." The jury under his charge and from the answers elicited by the Court itself was compelled to find against the plaintiff and for the defendant. This charge is so erroneous and so contrary to law, that in and of itself it is sufficient to require reversal and is the crux of the whole case. The act of kidnapping was done in New York. New York law controls. New York law says a child under 16 may not consent to be taken from her lawful guardian or person lawfully in charge of her. This child was 10 years old when she was forcibly snatched. Her testimony of her willingness to go cannot excuse the defendants or save them from answering for a crime under New York Law.

Shall it be said that the law requires stricter interpretation for the commission of a tort than a crime, and that although a crime was committed, there was no tort because the father did not have legal custody.

Even under Massachusetts decisions the consent of so young a child can be no defense to her illegal taking and a crime as well as a tort was committed.

In *Commonwealth* v. *Nickerson*, 5 Allen 518, the Massachusetts Court held that no evidence of malice need be shown to entitle the father to recover damages for the abduction of his child, and that a child of nine years was incapable of giving a valid consent to his taking. In this case the Court of Massachusetts held that the mere taking of the child was sufficient to sustain an indictment for assault and battery and false imprisonment of the child and the defendant was found guilty of a crime.

The Trial Court in its charge to the jury stated (fol. 35):

> "I'm very frank to say to you that under Massachusetts law, if we were applying the law of Massachusetts alone, there could be no recovery for the so-called abduction or kidnapping of the child; but we are governed in most respects by the laws of the State of New York where the alleged kidnapping took place."

These were highly prejudicial and erroneous statements and directly contrary to the law of Massachusetts as well as New York As a matter of fact, the leading case in New York *Pickle* v. *Paige*, 169 N.E. 650, 252 N. Y. 474; 72 A.L.R. 842, cites the Massachusetts cases in support of its findings (p. 478), and also holds that the father is entitled to punitive as well as compensatory damages without proving loss of service.

In *Stowe* v. *Heywood*, 7 Allen (Mass.) 118, 89 Mass. Rep. 118, the Massachusetts Court held that a father was entitled to recover for mental suffering when his child was abducted.

In *Price* v. *Nickerson*, 9 Allen 478, 91 Mass. Rep. 478, 85 Am. Dec. 777, the Massachusetts Court held that a father whose child was abducted, may recover reasonable expenses incurred in pursuit of his child, even though there is no evidence that the abduction was malicious. In

this case it was also held that the assent of the child was no defense.

The misleading and erroneous statement of the law in the charge to the jury were highly prejudicial and went to the very core of the father's rights and warrants the setting aside of the jury's verdict. The law of both jurisdictions follows the common law giving the father the right to recover both punitive and compensatory damages. The law of both states make such a taking a crime. The Trial Court in its charge also minimized the father's right to damages (R. 38, 39) and refused to instruct the jury as requested in request #18 (R. 48). This was serious error and warrants reversal.

The Massachusetts Order for Temporary Custody Even if Valid in Massachusetts Had No Validity Outside Massachusetts and Could Not Confer Immunity Upon Child's Abductors in New York

Even if the order awarding Mrs. Zisman temporary custody was valid in Massachusetts it had no validity outside Massachusetts and could not be acted upon in New York without a supplementary order of a court of competent jurisdiction in New York. It was error for the Trial Court to refuse to so charge.

It is well settled law requiring no citation that no state has power to execute on its judgments or orders outside its own boundaries. Any money judgment or judgment awarding chattels to be enforced in another state, must be sued on in the state where its enforcement is sought. Even if the order giving Mrs. Zisman temporary custody was valid in Massachusetts it could not be executed in New York without the aid of New York Courts. Zisman could not come into New York with a money judgment and seize the appellant's automobile on execution without first getting a New York judgment and the assistance of a sher-

iff. Yet in the case at bar, armed with a void Massachusetts order, without notice or warning, without the assistance of a New York Court, without the assistance of a sheriff, the defendant Zisman himself, seized the child and transported her. Appellant requested the Court to so instruct the jury, requests to charges 13, 14, 15, 16, 17 (R. 47, 48) and additional oral request (R. 40) but the Trial Court refused to so charge. As a matter of fact, the Court in a further charge to the jury (R. 41) instructed the jury that Zisman was under no obligation to do so. Shall it be said that Zisman had the right to seize a child under circumstances under which he could not seize a chattel?

Under the Liberties Guaranteed by Our Constitution the Father Had Lawful Custody of the Child for Even Divorced Parents May Agree With Each Other as to Custody

The appellant requested a directed verdict. In the face of requests 1 and 2 (R. 46) of the overwhelming evidence and on the law it was reversible error for the Court to refuse to direct the verdict.

There is no doubt that a tort was committed for which the Zismans are answerable. The Trial Court and the Court of Appeals both held that such tort-feasors are answerable if at all only to the "legal" guardian and then defined legal guardian as the person to whom custody was awarded by Court decree. Such findings are not only incompatible with the New York Penal Code, but utterly incompatible with common sense.

When the mother became an adjudicated incompetent and actually incarcerated in a hospital, it was not only the father's right but his duty to step forward, take his child and care for her. He needed no decree of any man made Court to follow the dictates of nature and conscience.

In the case at bar he further had the child thru the mother's own acts prior to her commitment. If the United States Court of Appeals and the Massachusetts District Court are correct, then anyone, even a stranger could come into New York and seize that unfortunate child while the mother was helpless and a patient in a mental institution and the father could have no redress and no relief.

Such rulings could establish most dangerous precedents. To permit them to stand is to subject the unfortunate child victim of divorce and mental illness of her parents, to additional unthinkable hazards, to make her a prey of any unscrupulous scoundrel who saw an opportunity to commit kidnapping with impunity. Such rulings rob the competent parent, innocent of wrongdoing, not only of his child but of his stature and dignity as a man and a father.

The father claims that he had the right to his child both by the operation of law and the affirmative acts of the mother. The United States Court of Appeals in its opinion finds that the mother actually turned the child over to the father prior to her adjudication.

In this free country of ours may not even divorced parents under the liberties guaranteed them by the 14th amendment, freely transfer custody from one parent to the other as need dictate, or has the state by granting a decree of divorce and awarding custody obtained such legal title to the child as to necessitate re-application to her Courts for any change whatsoever.

The fourteenth amendment guarantees that the privileges and immunities of citizens shall not be abridged. One of these inalienable rights is the right to move from one state to another. In *Williams* v. *Fears*, 179 U. S. 270, the Court states on page 274:

> "Undoubtedly the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty, and the

right, ordinarily of free transit from or through the territory of any state is a right secured by the Fourteenth Amendment and by other provisions of the Constitution."

The position taken by the Massachusetts Courts that Massachusetts still had jurisdiction over the child in spite of her removal from the state is repugnant even to the laws of Massachusetts itself, for under Chapter 208, Section 30 of the annotated laws of Massachusetts minor children of divorced parents over whom the Superior or Probate Court has jurisdiction shall not be removed from the Commonwealth *without the consent of both parents.* (Italics ours.)

It cannot by any stretch of the imagination be claimed that the child in the instant case had not been brought into New York with the *consent* of *both* parents. Even under Massachusetts Law which might on test be held unconstitutional, where both parents have consented, the child is validly without the jurisdiction and Massachusetts has lost the power to stretch her arms beyond her own boundaries.

In any event, there is *nothing* in the laws of Massachusetts or the laws of New York, which is authority for any finding, that even after divorce and award of custody to one parent or the other, the parents may not agree with each other, in the absence of any finding of unfitness of either parent, to transfer the custody from one parent to the other as suits the needs and welfare of the child. Custody in the first place is awarded, in cases of dispute, to the parent most suited at the time to care for the child. Custody is not awarded either as a reward or punishment. It does not confer absolute legal title to the child to the one obtaining custody, as a deed does to real estate. A child is not a chattel. The mere fact that one parent feels unable to care for the child should be sufficient reason to

transfer the custody to the parent who is able. To hold that while living in New York, the parents had to go back to Massachusetts and get a decree permitting the father to care for his own child during the mother's illness and with the mother's consent, is indeed vesting a state, not with democratic but totalitarian powers and is repugnant to our basic principles of freedom.

In *Meyer* v. *Nebraska*, 262 U. S. 390, Mr. Justice McReynolds, delivering the opinion of the Court partially defines due process as guaranteed by the fourteenth amendment, on page 399:

> "While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."

To hold that a divorced couple may not freely transfer custody of their children to each other as the need arises, is interference by a court in a case where the divorced parents do not seek interference and is an unwarranted infringement of liberty and denial of due process.

The Father Was Denied Due Process by the Conduct of the Trial. This Is a Case Justifying the Invocation of the Supreme Court's Supervisory Powers

Not only is the decision of the United States Court of Appeals affirming the District Court in conflict with the constitution of the United States and with Massachusetts

and New York decisions, but the trial itself was conducted in such total disregard of the ordinary rules of evidence and practice and procedure as to justify the invocation of the supervisory powers of this Court.

The Trial Court openly stated that it would not upset the Suffolk County Probate Court decrees, and conducted the trial accordingly. No effort was made to hide the fact that the Probate Court was to be upheld, Zisman's act of kidnapping minimized and the father denied any redress. That this was done to save face for the Probate Court whose initial unlawful act in giving an ex parte custody decree without notice to or service upon the father, precipitated all this litigation, does not minimize its reprehensibility. That it was done to save Zisman from possible prosecution for a criminal act likewise does not excuse the failure of the trial Court to follow the law. Zisman was a grown man, an attorney of 28 years standing, and is answerable for his actions. The following is only a brief and spotty outline of some of these highly erroneous and prejudicial rulings during the conduct of the trial.

The Court refused to permit testimony of the lack of proper legal proceedings in New York to enforce the alleged Massachusetts Probate order awarding custody (R. 14).

The Court permitted testimony of telephone conversations had *not* in the presence of plaintiff (R. 16).

The Trial Court made the statement (R. 17):

> "This is a family disturbance I am going to try it wide open. You may answer."

Thereafter, after making this statement the Trial Court violated almost every rule of evidence and proper trial procedure.

The witness Mrs. Zisman was permitted to testify as to conversations with her own husband, not in the presence of

plaintiff and telephone conversations had by her husband allegedly with a doctor in New York (R. 17).

The Trial Court itself asked the witness to testify as to a conversation with the witness's deceased father and again over objection at line 5, stated:

> "I will allow it. I said this is a family disturbance, I am going to try it wide open, get the true picture here, if we can."

Thereafter the witnesses testified to anything they pleased completely unhampered by any rules. Conversations with various people including doctors, all not in the presence of plaintiff, were permitted in evidence.

The defendant witness was permitted over objection to testify as to alleged conversations with the insane mother at the hospital, all not in the presence of the plaintiff (R. 19).

The defendant witness was permitted to put into evidence self-serving letters written by him to plaintiff's sister (Deft's. Exhs. B and C) (R. 20).

The Court allowed the witness to testify as to alleged doctor's findings without any vestige of proof as to their actuality or authenticity and stated at line 16,

> "I will allow it, I want the whole picture." (R. 21)

The Trial Court stated (R. 23):

> "You are getting far afield. I am not going to upset any Probate Court decree."

This was a prejudicial remark. If the Probate decree giving Mrs. Zisman temporary custody was void and unconstitutional because obtained without notice or service, the Trial Court was under duty to recognize that fact and had no authority or right to try to invest an absolutely void

order with legality. The Court in this respect should have charged as requested in plaintiff's requests Nos. 11, 12, 13, 14, 19 and 20. Any Court of any state may and should refuse to give weight to a void order or decree obtained without service or notice and in violation of due process and the Constitution of the United States.

The Court itself undertook the defendant's defense and interrogated and led the child witness to bring out that the child had gone willingly with her captors and had not been induced by false promises (R. 23 and 24).

The Court would not permit proper cross-examination of the witness as to prior admitted perjuries (R. 24).

The Trial Court refused to permit the plaintiff to testify that he had never consented to the taking of his child (R. 31).

A similar ruling (R. 31).

The Court allowed an alleged conversation with the child not in the plaintiff's presence (R. 32).

On page 116 of the Stenographic Record (R. 32) the Court, over objection ordered the plaintiff's sister, his attorney in New York and sitting as co-counsel in this case, to testify, although absolute privilege was asserted, stating, "The prividege is not extended so far. There is no question of privilege here."

These are only a few of the examples of the Court's erroneous rulings and the way the trial was conducted.

There is no authority in any law for the type of trial procedure that was here used. There is no authority known to appellant's attorneys for the complete abandonment of all rules of evidence and proper trial procedure and for the breaking of the seal of privilege between attorney and client. A child was kidnapped from her father while her mother was ill. It is not for the Trial Court to

excuse such conduct and manipulate a trial to save the defendants from answering for their acts, as to save face for the Probate Court which issued a void and unconstitutional order. The Trial Court in its charge (R. 38) repeated,

> "You heard me say several times during the trial of this case when either side may have objected, that I was going to try the case wide open. By that I meant, I was going to liberalize as far as I could legally, the laws of evidence so that you might better understand the actual situation here."

This is indeed most unusual procedure. Where is the authority in law giving a Trial Court the right to so do; to compel a client's own attorney to testify to privileged communications; to permit a defendant witness to testify as to alleged findings of doctors without producing the doctors, without proof that the alleged doctor even existed or had ever made an examination; to permit hearsay and self serving declarations, and conversations held not in the presence of plaintiff?.

After the testimony was completed, the Court then proceeded to charge the jury without permitting counsel to sum up (R. 35) and then when objection was raised (R. 40) told the jury to forget everything and permitted argument. After argument the Court again erroneously charged (R. 40, 41):

> "I don't intend to add much to what I said to you, but some reference has been made to the fact that the father had custody of this child, I say to you as a matter of law that from the moment the probate decree was signed giving custody to the mother, she alone had the legal right to the child until that decree was vacated * * *
>
> I will also call to your attention, that some reference has been made to the fact that Mr. Zisman did not go

to a Court in New York for an agency or something of that nature. If he had any rights in the matter, he wasn't bound to go to those places.

Now again I will refer to the definition of conspiracy as an agreement to do an illegal act. Secondly, I have adverted to kidnapping as a diverting of a person's normal method of living by reason of force or fraud. If you don't find that, then there must be a verdict for defendants."

As has been already pointed out, these charges are in complete contravention of the law. The statement that the mother had "legal custody at all times" in the face of the fact of her incarceration in a mental hospital at the time the child was kidnapped is unrealistic if not ridiculous. Where was the child to go when the mother went to the hospital? To the mental hospital with the sick mother? Was it not only the right but the moral duty and legal obligation of the father to care for that child during the mother's illness? Would any Court, if Mr. Zisman had not kidnapped the child, have excused the father if he had refused to care for his child because he did not have "legal" custody?

The whole case actually seems to revolve around the definition of "legal" custody, and the rights it confers. Does it give legal title to children as a deed does to real estate or a bill of sale to chattels? Or is it the *custodial* aspect only that is paramount, an aspect that should have as its first consideration the care of the child and not the rights of the custodian.

The errors committed during the trial were so flagrant and in such utter violation of all rules of evidence and procedure as to have deprived the father of his constitutional rights to a fair trial. The father has been denied both due process and the equal protection of the laws by the failure of the trial court to follow the fundamental rules of procedure and evidence during trial.

The decisions of the Supreme Court of the United States have held that due process requires proper notice and opportunity to be heard. It has held further that due process requires that the hearing shall be in accord with the usual practice and procedure followed in such cases in the tribunal where heard. None of the rules of practice and procedure of this State have been followed in the instant litigation. Such flagrant disregard of all orderly methods of trial and procedure as directed by legislative enactment is a denial of due process and equal protection and violates the constitution.

Brinkerhoff-Faris Trust & Savings Company v. *Hill, Treasurer, etc.*, 281 U. S. 673;
In *Windsor* v. *McVeigh*, 93 U. S. 274.

This litigation has been brought on by the initial unconstitutional act of the Probate Court of Massachusetts in giving an *ex parte* order for custody to one other than a natural parent, without service or notice and in violation of due process. By so doing the Probate Court brought about what is a criminal kidnapping both under New York and Massachusetts statutes, and precipitated a grievous and protracted litigation, at a price, not counting the cost in money, of untold human suffering. A child has been subjected to great psychologic trauma the full effects of which may not even be recognized for years; a relationship between parent and child has been irreparably impaired, if not destroyed; and an ill and confused woman has been exploited and further frightened and probably retarded in her recovery. The record shows that prior to the kidnapping she had no fear of sending the child to the child's father. But the granting of this void order cannot excuse the defendants. The defendant Zisman himself is an attorney of 28 years experience (R. 8). He knew or should have known what he was doing. He knew that during the mother's illness the father, as a natural parent had the absolute right and duty to care for the child. He knew

that the courts of New York would never take the child from the father under the circumstances. Yet he permitted himself to violate every rule of law and order, ethics and decency; he submitted a false affidavit to the Massachusetts Probate Court "that the child was not properly cared for" he obtained an *ex parte* order without notice or service and then knowingly went into New York and seized a child of tender years and sensitivity from outside her school and literally tore her from her father's arms and then demanded money for her care.

A great wrong has been done to the child, to the father and to the mother. But the wrong is far greater and deeper than the harm to these individuals. The financial cost of the litigation or reimbursement therefor or money to soothe the father's hurts are not the important issues in this case. If the Zismans are permitted to escape all obligation to answer for their deeds, then the most basic principles of our way of life, the most fundamental guarantees of our constitution, to due process and equal protection of the laws have been violated and undermined. If the Zismans and the Probate Court of Massachusetts are upheld in their actions, then a dangerous precedent indeed, will have been established.

CONCLUSION

The U. S. Court of Appeals is correct in one determination. There should have been a directed verdict, but for the plaintiff not the defendants.

For the foregoing reasons it is respectfully requested that certiorari be granted.

Respectfully submitted,

RICHARD L. WILDER,
DORA ABERLIN,
Attorneys for Plaintiff-Appellant.

Appendix A

STATUTES INVOLVED

Chapter 208 of the Annotated Laws of Massachusetts, Section 28—

> "Upon decree of divorce, or petition of either parent, or of a next friend in behalf of the children, after notice to both parents, after decree, the court may make such decree as it considers expedient relative to the care, custody and maintenance of the minor children of the parties * * *"

Chapter 208 of the Annotated Laws of Massachusetts, Section 30—

> "A minor child of divorced parents who is a native of or has resided 5 years within this Commonwealth and over whose custody and maintenance the Superior court, or a Probate Court has jurisdiction, shall not, if of suitable age to signify his consent, be removed out of this Commonwealth without such consent, or if under that age without the consent of both parents, unless the Court upon cause shown, otherwise orders."

New York Penal Law, Section 1250, subdivision 2—

> "A person who wilfully: 2. Leads, takes, entices away, or detains a child under the age of sixteen years, with intent to keep or conceal it from its parents, guardian, or other person having the lawful care or control thereof, or to extort or obtain money or reward for the return or disposition of the child, or with intent to steal any article about or on the person of the child;
>
> * * *

Is guilty of kidnapping, which is a felony * * *"

New York Penal Law, Section 1252—

"Upon a trial for a violation of this article, the consent thereto of the person kidnapped or confined shall not be a defense, unless it appears satisfactorily to the jury that such person was above the age of sixteen years, and that the consent was not extorted by threats or duress. As amended L. 1928, c. 355, eff. Sept. 1, 1928."

United States Constitution, Amendment IV—

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

United States Constitution, Amendment XIV, Section 1—

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Appendix B

Opinion of Court
Letter May 27, 1957 Amending Opinion

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Nos. 5218, 5222.

ISADORE ABERLIN,

PLAINTIFF, APPELLANT,

v.

JAMES ZISMAN ET AL.,

DEFENDANTS, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS.

Before MAGRUDER, *Chief Judge,* and WOODBURY and HARTIGAN, *Circuit Judges.*

Dora Aberlin, with whom *Richard L. Wilder* was on brief, for appellant.
James Zisman pro se, and for Lenore Zisman, appellees.

OPINION OF THE COURT.
May 21, 1957.

PER CURIAM. This case arose out of an unfortunate family squabble. Federal jurisdiction was invoked on diver-

sity of citizenship. The complaint charged that defendants, on April 1, 1955, committed a tort to the plaintiff under the laws of New York in that defendants abducted plaintiff's minor daughter from his lawful custody in New York and transferred the girl without plaintiff's assent to Massachusetts. Plaintiff demanded judgment in the sum of $250,000. The district court left the case to the jury, which returned a verdict for defendants. On December 6, 1956, the district court entered judgment for defendants in accordance with the verdict. On December 14, 1956, plaintiff filed his motion for a new trial. The pendency of this motion, undisposed of, temporarily terminated the appealability of the judgment. See Rule 73(a), F.R.C.P.; *Denholm & McKay Co.* v. *Commissioner*, 132 F. 2d 243, 247 (C.A. 1st, 1942). See also *R.F.C.* v. *Mouat*, 184 F. 2d 44; 48 (C.A. 9th, 1950). Therefore, plaintiff's notice of appeal from this judgment, filed December 17, 1956, was premature and a nullity, and this appeal (No. 5218) will have to be dismissed for lack of jurisdiction. On December 26, 1956, the district court entered an order denying plaintiff's motion for a new trial, and plaintiff filed a separate notice of appeal (No. 5222) from this order. Such an order is appealable, as we explained in *Peterman* v. *Indian Motorcycle Co.*, 216 F. 2d 289 (1954); and on such appeal appellant is free to assert any alleged errors which entered into and infected the judgment, the existence of which errors would make it an abuse of discretion for the district court to deny the motion for a new trial. The appeal in No. 5222 is thus properly before us.

Selma Aberlin, a resident of Massachusetts, was plaintiff's wife, and the girl, Dorothy Gail Aberlin, was born of that marriage. By decree of the Probate Court, County of Suffolk, Commonwealth of Massachusetts, entered May 15, 1953, Selma, the mother, was granted a divorce from her husband and was awarded custody of the minor child.

The father was ordered by the decree to pay $25 weekly for the child's support. Subsequently, the father moved to New York and established his residence in that state. The mother, not being well and being on the verge of a nervous breakdown, asked the father to take care of the girl, and the child was physically transferred to New York City to live in an apartment occupied jointly by the father and by his sister Gertrude Aberlin. For a short time the mother, who had gone to New York, received treatment at the Bellevue Hospital. Later, at the instance of her sister Lenore A. Zisman and of her brother-in-law James Zisman, the latter two being the defendants herein, the mother was brought back to Massachusetts; and for a time the mother was legally committed to the Boston State Hospital.

While this commitment was outstanding, the Probate Court for Suffolk County on March 25, 1955, entered a decree awarding temporary custody of the minor child to her aunt Lenore Zisman. It is claimed that this decree was void for lack of notice to the father.

At any rate, armed with this decree defendant James Zisman journeyed to New York, found the little girl at school and persuaded her to accompany him back to the home of the two defendants in Stoughton, Mass., where she stayed for several months. There was no evidence that this removal was accomplished by the use of any force or fraud practiced upon the girl, who testified that she went willingly and that her life with her aunt and uncle was a happy one. On the other hand, it is clear that the father had no advance knowledge of this planned removal and did not give his consent thereto. Eventually the mother was released from commitment, and the Probate Court took appropriate action to restore the original provision of the divorce decree awarding legal custody to the mother.

It is claimed by appellant that, when the mother was committed to the Boston State Hospital, the divorced father, by the common law, became automatically vested with lawful right of custody of his child. In support of this proposition appellant cites *Barry* v. *Sparks*, 306 Mass. 80, 83 (1940). In that case, after a decree of divorce had been entered awarding custody of the child to the mother, the mother subsequently died, and the Massachusetts court said that the divorce decree ceased to have any further continuing effect, "at least when, as here, the decree makes no provision for its continuance beyond the lives of the parents"; with the result that after the death of the mother the rights and obligations of the father with respect to his minor child "are those of a surviving parent, unaffected by the decree which had been entered in the divorce proceedings." That case is obviously inapplicable here, where the mother did not die but at most suffered a transitory period of incompetency.

It seems clear to us that the fact of such temporary incompetency merely gave ground for an application to the Probate Court for a modification of the decree awarding custody to the mother; but it does not follow that the divorced father necessarily would be found by the court to be an appropriate custodian of the child. In *King* v. *King*, 243 App. Div. 780 (1935), subsequent to a decree of divorce awarding custody to the mother she became incompetent; and the divorced father applied to the court for an order modifying the divorce decree as to custody. The court was of opinion that, under the circumstances then existing, "the father should have the custody of the children during the mother's incompetency," and so provided by an order changing the terms of the divorce decree. But clearly, until the father did so apply and so obtain a court order, he did not, by the New York law, become automatically vested with the custody of his children.

Appendix B

In an effort to establish that by the law of New York what the defendants did here amounted to a tort, appellant places great reliance upon *Pickle v. Page*, 252 N. Y. 474, 169 N. E. 650 (1930). In that case the plaintiffs, who were grandfather and grandmother of the child, had legally adopted him upon his abandonment by his mother. Being therefore lawfully entitled to the custody of the child, it was held that the foster parents could sustain an action for damages for injury done to their feelings by reason of the abduction of the child, without the necessity of alleging or proving loss of service. That case is of no help to the plaintiff here, where the father was not the lawfully appointed guardian of the child. If, as plaintiff asserts, the Probate Court's decree awarding temporary custody to the defendant Lenore Zisman was void, the result would be that there was, at the time of the alleged tortious acts, an unmodified decree of divorce dated May 15, 1953, awarding custody of the child to the mother.

On the uncontradicted facts of the case, we have difficulty in understanding why the defendants were not entitled to have the district court grant their motions for a directed verdict. In any event, the court left the case to the jury, which brought in a verdict for defendants, and we find no reversible error.

A judgment will be entered dismissing the appeal in No. 5218 and affirming the order of the District Court in No. 5222.

Appendix B

Office of the Clerk
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

ROGER A. STINCHFIELD
Clerk

1602 U. S. P. O. & Court House
Boston 9, Massachusetts

May 27, 1957

To Counsel.

Nos. 5218, 5222
Isadore Aberlin v. James Zisman et al.

Dear Miss Aberlin and Mr. Zisman.

The opinion of this Court in these cases, dated May 21, 1957, has been amended by striking therefrom the full paragraph immediately preceding the words in italics at the end of the opinion and substituting the following: At the close of the evidence, defendants moved for a directed verdict which the District Court reserved under Rule 50(b) F.R.C.P. Even if the jury had returned a verdict for the plaintiff, it seems that the District Court would have been required on the uncontradicted facts of the case to enter judgment for the defendants n. o. v. As it turned out the jury brought in a verdict for the defendants upon which judgment was entered, and we find no reversible error.

Sincerely yours,

ROGER A. STINCHFIELD,
Clerk.

RAS:wjs

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